ANNULMENT OF MARRIAGE BETWEEN FIRST COUSINS REFUSED WHEN VALID WHERE CONTRACTED

Mazzolini v. Mazzolini

168 Ohio St. 358, 155 N.E.2d 206 (1958).

Plaintiff-appellant Edward Mazzolini sought to annul his Massachusetts marriage to his first cousin, Josephine Mazzolini. The Court of Common Pleas, Cuyahoga County, dismissed the suit and the Court of Appeals affirmed. In upholding the appellate court's decision, the Supreme Court of Ohio held that a marriage between first cousins, valid in Massachusetts[1] and not expressly forbidden by Ohio statute,[2] was a valid marriage against which the appellant could not maintain an annulment action.[3]

The court was confronted with the issue of whether the marriage was void under Ohio law in order to determine the validity of the Massachusetts marriage. Under the statutory law of Massachusetts, marriage between first cousins is permissible.[4] However, a person who resides in another jurisdiction and intends to continue to reside there, may not contract marriage within Massachusetts if such marriage would be void in the jurisdiction of that person's residence.[5] Generally, a marriage that is valid where solemnized is valid everywhere.[6] The wording of the Massachusetts statute however, forced the Ohio court to determine the validity of Mazzolini's marriage in Massachusetts by interpreting the meaning of the Ohio statue which states that "Male persons of the age of eighteen years, and not having a husband or wife living, may be joined in marriage . . .."[7]

In states where statutory law decrees the limits within which relatives may not marry, the courts have split on how to interpret the statute.[8]

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[1] MASS. ANN. LAWS ch. 207, §§ 1, 2 (1955), *Sec.* 1. "No man shall marry his mother, grandmother ,daughter, granddaughter, sister, step-mother, wife's grandmother, wife's daughter, wife's granddaughter, sister's daughter, father's sister, or mother's sister. *Sec.* 2. No woman shall marry her father, grandfather, son, grandson, brother, step-father, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother or mother's brother."

[2] OHIO REV. CODE § 3101.01 (1955). "Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. . . ."

[3] Mazzolini v. Mazzolini, 168 Ohio St. 358, 155 N.E.2d 206 (1958).

[4] MASS. ANN. LAWS, ch. 207, §§ 1, 2 (1955).

[5] MASS. ANN. LAWS, ch. 207, § 11 (1955).

[6] McDowell v. Sapp, 39 Ohio St. 558, 560; 55 C.J.S. *Marriage* § 4 (1955).

[7] OHIO REV. CODE, § 3101.01 (1955).

[8] State v. Yoder, 113 Minn. 503, 130 N.W. 10 (1911); State v. Smith, 101 S.C.

Some courts construe the statute strictly holding such marriage void *ab initio*,[9] while other courts give a liberal interpretation. *i.e.*, the statute is merely declaratory of the common law[10] and therefore, a marriage not expressly forbidden by statute, is void only upon a decree of the court during the lives of the parties.[11] The effect is to make such marriages voidable even though the statute uses the word "void".[12]

The Ohio court was only concerned with whether the marriage would be void in Ohio. Prior to this case the court had never decided the issue of whether a marriage between first cousins was void.[13] The court stated that in the absence of an express statutory prohibition on marriage between first cousins, it would not declare such a marriage void. The result of this decision was to uphold the validity of appellant's marriage under the laws of Massachusetts, the place of celebration, and deprive him of his action to annul the marriage. He had entered into a valid marriage and his only relief for terminating it lay in a divorce action if he could show the proper grounds.

The question remains as to how the Ohio Supreme Court would have met the issue of consanguinity had the marriage taken place in Ohio. Because the court was determining the validity of the marriage according to the law of Massachusetts, it was not at liberty to consider the general law of Ohio pertaining to validity of marriages. Therefore, the court confined itself solely to the issue raised by the Massachusetts statute of whether or not the marriage would be void if made in Ohio, otherwise it would have said voidable. The following language from the opinion shows this clearly:

> ". . . we are persuaded to adopt, *in the instant case*, the position represented by the trend of the more modern cases and in accord with the general rule, 'that a marriage between persons of a class that the statute simply says shall not marry . . . is not void in the absence of a declaration in the statute that such marriage is void.' "[15]

293, 85 S.E. 158 (1915) (the statute being read as making the marriage voidable). *Contra*, Arado v. Arado, 281 Ill. 123, 117 N.E. 816 (1917); Ragan v. Cox, 208 Ark. 809, 187 S.W.2d 874 (1945).

[9] Osoinach v. Watkins, 235 Ala. 564, 180 So. 577 (1938); McIlvain v. Schiebley, 109 Ky. 455, 59 S.W. 498 (1900); Fearnow v. Johnes, 34 Okl. 694, 126 Pac 1015 (1912).

[10] Bennett v. Bennett, 195 S.C. 1, 10 S.E.2d 23 (1940).

[11] Harrison v. State, 22 Md. 468, 85 Am. Dec. 658 (1864); Parker's Appeal, 44 Pa. 309 (1863).

[12] State v. Smith, 101 S.C. 293, 85 S.E. 958 (1915); Commonwealth v. Perryman, 2 Va. 717 (1830).

[13] 168 Ohio St. at 359, 155 N.E.2d at 208.

[14] Warner v. Warner, 11 Ohio Dec. Rep. 379 (1891); Vernon v. Vernon, 9 Ohio Dec. Rep. 365 (1883); 17 OHIO JUR.2d, *Marriage* § 7 (1956).

[15] 168 Ohio St. at 359, 155 N.E.2d at 208, 209.

It seems therefore that an annulment action would still be available to first cousins who contracted a marriage in Ohio.[16]

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[16] At the present time a person who marries with the statutory disability of nonage or prior marriage is deemed to have entered into an absolutely void marriage, Shafher v. State, 20 Ohio 1 (1820) (nonage); Johnson v. Wolford, 117 Ohio St. 136, 157 N.E. 385 (1927) (prior marriage). If the problem should arise now, where one of the contracting parties to the marriage has the statutory disability of either nonage or prior marriage, there is the strong probability that the Ohio Supreme Court would declare such a marriage voidable on the reasoning of this case, *i.e.*, that the statute does not expressly forbid marriages with these classes of persons.